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Jhawar, Shon Boney, Joseph Fortunato,
Lawrence P. Molloy, and Steven H. Townsend*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Public Employees' Retirement System of
Mississippi, Individually and on Behalf of
All Others Similarly Situated,

Plaintiff,

v.

Sprouts Farmers Market, Inc., J. Douglas
Sanders, Amin N. Maredia, Donna
Berlinski, Andrew S. Jhawar, Shon Boney,
Joseph Fortunato, Lawrence P. Molloy,
Steven H. Townsend, AP Sprouts Holdings,
LLC, AP Sprouts Holdings (Overseas), L.P.,
Barclays Capital Inc., and Morgan Stanley
& Co. LLC,

Defendants.

No. 2:16-cv-00815-ROS

**DEFENDANTS' NOTICE OF
APPEAL**

Notice is hereby given that Defendants Sprouts Farmers Market, Inc., J.
Douglas Sanders, Amin N. Maredia, Donna Berlinski, Andrew S. Jhawar, Shon
Boney, Joseph Fortunato, Lawrence P. Molloy, Steven H. Townsend, AP Sprouts

1 Holdings, LLC, AP Sprouts Holdings (Overseas), L.P., Barclays Capital Inc., and
2 Morgan Stanley & Co. LLC (collectively, “Defendants”), hereby appeal to the United
3 States Court of Appeals for the Ninth Circuit from the Order of March 24, 2017,
4 entered by the United States District Court for the District of Arizona, remanding the
5 above-captioned action to state court. The March 24, 2017 Order is attached hereto as
6 Exhibit A.

7
8 The District Court’s “remand order is not barred from review under [28
9 U.S.C.] § 1447(d)” and is “final for purposes of [28 U.S.C.] § 1291.” *Harmston v.*
10 *City & Cnty. of San Francisco*, 627 F.3d 1273, 1278 (9th Cir. 2010). The Ninth
11 Circuit has recently permitted an appeal to proceed from a district court order that
12 ordered remand of a Securities Act of 1933 class action in virtually identical
13 circumstances. *See Ellis v. Natera, Inc., et al.*, No. 16-16576 (9th Cir. Jan. 13, 2017)
14 (ECF No. 10) (denying plaintiff-appellee’s motion to dismiss appeals and directing
15 parties to include in their merits briefing whether the remand of a federal securities
16 case is appealable to the Ninth Circuit).

17 Defendants’ Representation Statement is attached to this Notice as required by
18 Ninth Circuit Rule 3-2(b).

19 DATED this 21st day of April, 2017.

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9 *Counsel for Barclays Capital Inc.*
10 *and Morgan Stanley & Co. LLC*

11 **CERTIFICATE OF SERVICE**

12 I hereby certify that on April 21st, 2017, the attached document was electronically
13 transmitted to the Clerk of the Court using the CM/ECF System which will send notification of
14 such filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

15 s/ Maureen Beyers
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Exhibit A

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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Public Employees' Retirement System of
10 Mississippi,

11 Plaintiff,

12 v.

13 Sprouts Farmers Market Incorporated, et
14 al.,

15 Defendants.

No. CV-16-00815-PHX-ROS

ORDER

16 Plaintiff Public Employees' Retirement System of Mississippi filed this case in
17 state court. The operative complaint asserts claims solely under federal law. Hoping this
18 Court would go against the weight of authority in the Ninth Circuit, Defendants removed
19 the case to federal court. Plaintiff now seeks remand, arguing federal jurisdiction does
20 not exist. While remanding a complaint with federal claims is unusual, it is supported by
21 a straightforward application of the applicable statutes. Therefore, this case will be
22 remanded for lack of subject matter jurisdiction.

23 **BACKGROUND**

24 The factual background and basis for Plaintiff's claims need only be described in
25 very basic details. Plaintiff filed this suit as a putative class action on behalf of all
26 persons who purchased or acquired the stock of Sprouts Famers Market, Inc. Plaintiff
27 believes Sprouts did not disclose certain information that it should have disclosed. Based
28 on that, Plaintiff filed claims under the Securities Act of 1933 against Sprouts, related

1 companies, and numerous individuals (collectively, “Defendants”). Plaintiff did not
 2 assert any state-law claims but filed its suit in state court. Defendants removed the case
 3 to federal court, arguing removal was proper because the claims asserted in the complaint
 4 arise under federal law. Plaintiff agrees it is only asserting federal claims but argues the
 5 case must be remanded.

6 ANALYSIS

7 Whether this case can remain in federal court depends on the interpretation and
 8 application of three statutory provisions. The first two provisions are found at 15 U.S.C.
 9 § 77p(b) and 15 U.S.C. § 77p(c). The Ninth Circuit has described these two provisions in
 10 simple terms. First, “[s]ubsection 77p(b) is commonly referred to as the ‘preclusion
 11 provision’ because it bars individuals from bringing certain state-law securities fraud
 12 claims as class actions in either state or federal court.” *Rainero v. Archon Corp.*, 844
 13 F.3d 832, 837 (9th Cir. 2016). Second, subsection 77p(c) allows for the removal from
 14 state court of certain state-law securities fraud claims brought in class actions. *Id.* The
 15 way these two provisions work in practice is that, if a plaintiff attempts to file a class
 16 action asserting state-law securities fraud claims in state court, the defendant can remove
 17 the case to federal court and the federal court will simply dismiss the state-law claims.
 18 *See, e.g., Madden v. Cowen & Co.*, 576 F.3d 957, 965 (9th Cir. 2009) (noting any suit
 19 removable under § 77p(c) is precluded by § 77p(b)). Complications arise, however,
 20 when a class action asserting solely federal-law securities claims is filed in state court.

21 When such a complaint is filed in state court, the final statutory provision becomes
 22 relevant. That provision, 15 U.S.C. § 77v(a), is lengthy but only two relatively short
 23 portions are relevant here. The first portion confers concurrent jurisdiction, with one
 24 notable exception, on both state and federal courts to hear federal-law securities claims:

25 The district courts of the United States . . . shall have jurisdiction of
 26 offenses and violations [of federal securities laws and regulations], and,
 27 concurrent with State and Territorial courts, except as provided in section
 28 77p of this title with respect to covered class actions, of all suits in equity
 and actions at law brought to enforce any liability or duty created by this
 subchapter.

1 This portion means federal and state courts have concurrent jurisdiction to hear federal-
 2 law securities claims, with an exception that certain class actions claims cannot be
 3 brought in either federal or state courts. The next portion of § 77v(a) has been labeled by
 4 courts “the removal bar.” That portion states:

5 Except as provided in section 77p(c) of this title, no case arising under this
 6 subchapter and brought in any State court of competent jurisdiction shall be
 7 removed to any court of the United States.

8 15 U.S.C.A. § 77v(a). On first glance, it appears the removal bar means the only class
 9 actions that can be removed to federal court are those class actions covered by § 77p(c),
 10 *i.e.*, class actions involving state-law claims. The reasoning is as follows: § 77p(b)
 11 precludes class actions based on state-law, § 77p(c) allows for the removal of class
 12 actions based on state-law, and § 77v(a) leaves the removal bar in place for all non-
 13 precluded suits. That means complaints filed in state court asserting solely federal-law
 14 claims must remain in state court. Defendants present a variety of arguments why this
 15 strange result is not correct, primarily focusing on the language “State court of competent
 16 jurisdiction.” According to Defendants, state courts are not “court[s] of competent
 17 jurisdiction” to hear suits alleging solely federal claims. Legislative history and
 18 “common sense” allegedly make this clear.

19 District courts across the country have addressed this exact issue and reached
 20 different results. District courts in the Ninth Circuit have also issued conflicting rulings.
 21 But as noted in 2015, the “increasing majority view among the district courts within the
 22 Ninth Circuit” is that securities class actions alleging solely federal claims cannot be
 23 removed to federal court. *Cervantes v. Dickerson*, No. 15-CV-3825-PJH, 2015 WL
 24 6163573, at *4 (N.D. Cal. Oct. 21, 2015) (citing eight other district court decisions
 25 reaching same conclusion). At least one judge in the District of Arizona has followed
 26 that majority view. *Westmoreland Cty. Employee Ret. Fund v. Inventure Foods Inc.*, No.
 27 CV-16-01410-PHX-SMM, 2016 WL 7654657, at *1 (D. Ariz. Aug. 11, 2016). Those
 28 decisions engage—often at considerable length—with all of the arguments supporting the
 competing readings of the statutory provisions. *Dickerson*, 2015 WL 6163573, at *4-*7.

1 Defendants argue the analysis in the cases ordering remand leads to a “facially absurd
2 result” and is contrary to “common sense.” (Doc. 35 at 6). Moreover, Defendants claim
3 “neither Ninth Circuit law nor any other federal appellate decision requires, or supports in
4 any way, remand of this action.” (Doc. 35 at 7). These arguments are plainly overstated.

5 It is neither facially absurd nor contrary to common sense for Congress to decide
6 certain “federal claims instituted in state court [are] nonremovable,” particularly where
7 concurrent jurisdiction was long accepted. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S.
8 368, 386 n.15 (2012). In fact, the Supreme Court—albeit in passing—cited § 77(v)(a) as
9 an example of Congress doing precisely that. *Id.* Moreover, there certainly is *some*
10 support in Ninth Circuit authority for finding this case nonremovable. After all,
11 Defendants devote portions of their brief opposing remand to discussing why statements
12 in *Luther v. Countrywide Home Loans Servicing LP*, 533 F.3d 1031 (9th Cir. 2008) and
13 *Madden v. Cowen & Co.*, 576 F.3d 957 (9th Cir. 2009) do not require remand.
14 Defendants argue those statements are dicta. But that is a concession that those cases
15 provide some support for remanding this case. *See United States v. Johnson*, 256 F.3d
16 895, 915 (9th Cir. 2001) (noting statements in opinions “uttered in passing without due
17 consideration of the alternatives” should be reconsidered “cautiously and rarely”).
18 Accordingly, Defendants’ argument that Ninth Circuit authority does not “support in any
19 way” ordering remand is incorrect.

20 In the end, there are plausible arguments supporting both readings of the relevant
21 statutes. Those arguments have been discussed and analyzed in exhaustive detail by
22 other courts and nothing would be gained by repeating the analyses here. Among those
23 decisions, the better reasoned ones find cases such as the present are nonremovable. This
24 result is driven, in large part, by the “deeply rooted presumption in favor of concurrent
25 state court jurisdiction.” *Mims*, 565 U.S. at 378. State courts had concurrent jurisdiction
26 after the enactment of the Securities Act of 1933. And while Defendants claim Congress
27 ousted state courts of jurisdiction in 1998, Congress “does not . . . hide elephants in
28 mouseholes.” *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001).

1 Accordingly, if Congress meant to overcome the presumption of concurrent jurisdiction
2 for a statute where such jurisdiction had indisputably existed for decades, it seems
3 unlikely it concealed this desire in a complicated and confusing statutory scheme
4 whereby courts must read cross-referencing statutes subject to multiple plausible
5 readings.

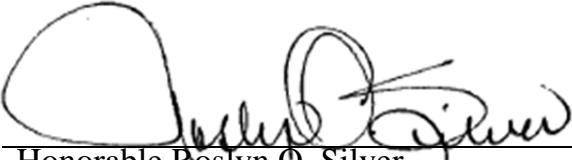
6 Finally, Defendants believe a pending writ of certiorari to the United States
7 Supreme Court will resolve this issue. The Supreme Court is currently awaiting
8 additional briefing and even if certiorari were granted, no decision would be issued until
9 late this year. It would unduly delay this case to wait for that decision.

10 Accordingly,

11 **IT IS ORDERED** the Motion to Remand (Doc. 34) is **GRANTED**. The Clerk of
12 Court is directed to remand this case to the Maricopa County Superior Court.

13 Dated this 24th day of March, 2017.

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Honorable Roslyn O. Silver
Senior United States District Judge

United States District Court

District of Arizona
Office of the Clerk

Brian D. Karth

District Court Executive / Clerk Of Court
Sandra Day O'Connor U. S. Courthouse, Suite 130
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March 27, 2017

Clerk's Office
Maricopa County Superior Court
201 West Jefferson St.
Phoenix, AZ 85003-2205

ATTN: Civil File Counter

RE: REMAND TO MARICOPA COUNTY SUPERIOR COURT

District Court Case Number: CV-16-815-PHX-ROS

Superior Court Case Number: CV2016-050480

Dear Clerk of Court:

Enclosed is a certified copy of the Order entered in this Court on March 27, 2017, remanding the above case to Maricopa County Superior Court for the State of Arizona.

Sincerely,

BRIAN D. KARTH, DCE/CLERK OF COURT

S/L. Dixon
Deputy Clerk

Enclosure
cc: all counsel

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**IN THE UNITED STATES DISTRICT COURT
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Public Employees' Retirement System of
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Steven H. Townsend, AP Sprouts Holdings,
LLC, AP Sprouts Holdings (Overseas), L.P.,
Barclays Capital Inc., and Morgan Stanley
& Co. LLC,

Defendants.

No. 2:16-cv-00815-ROS

**DEFENDANTS'
REPRESENTATION STATEMENT**

The undersigned represent Defendants Sprouts Farmers Market, Inc., J.
Douglas Sanders, Amin N. Maredia, Donna Berlinski, Andrew S. Jhawar, Shon
Boney, Joseph Fortunato, Lawrence P. Molloy, Steven H. Townsend, AP Sprouts

Holdings, LLC, AP Sprouts Holdings (Overseas), L.P., Barclays Capital Inc., and Morgan Stanley & Co. LLC (collectively, “Defendants”). Pursuant to Rule 12(b) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 3-2(b), Defendants submit this Representation Statement. The following list identifies all parties to this action and identifies their respective counsel by name, firm, address, telephone number, and e-mail.

PARTY	COUNSEL OF RECORD
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DATED this 21st day of April, 2017.

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